THE CORPORATION JOURNAL

(REGISTERED U. S. PAT. OFFICE)

VOL. XI, No. 16 APRIL, 1935 PAGES 361-384

COMPLETE NUMBER, 227

Published by

THE CORPORATION TRUST COMPANY AND AFFILIATED COMPANIES

The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation and maintenance of corporations, is to deal with members of the bar, exclusively.

DISADVANTAGE OF RECEIVERSHIPS

A plan of liquidation substituted for receivership. A Vice Chancellor of New Jersey, in *Ripp v. Fidelity Title & Mortgage Guaranty Co.*, 174 A. 229, says: "There are both advantages and disadvantages to administration of property by the Court of Chancery or any other court. The honest conduct of the court's agents and the distribution of assets in accordance with the rights of parties determined after full hearing are generally assured. * * * A disadvantage generally found is a lack of energy in the administration. Receivers do the safe, routine things, but seldom do they scour the land for customers and lie awake nights devising ways to make a deal. Administration by the court is apt to be expensive, since the procedure is that of litigation. As every step must be submitted to the court, the receivers and their counsel spend a great amount of time on court work which brings no profit to the estate but for which the estate must pay. While the Court of Chancery can undoubtedly administer an estate for a very long period, I confess that the notion of a receivership extending ten or fifteen years is distasteful to me. The prime function of the court is the enforcement of equitable rights and not the running of a business. * * * I prefer to handle my own personal business rather than turn it over to another, though he be wiser than I."

President.

THE CORPORATION JOURNAL

VOL. XI, No. 16 APRIL, 1935 PAGES 361-384

The Corporation Journal is published by The Corporation Trust Company monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve the Journal in a permanent file, a special and very convenient form of binder will be furnished at cost ($1.50).

Contents for April

AMENDMENT OF CHARTER AFTER QUALIFICATION AS FOREIGN CORPORATION

R. A. MacLean

When a corporation amends its articles or certificate of incorporation, it is important to observe the applicable requirements of any states in which it has been authorized to do business as a foreign corporation.

In certain states, Illinois, Michigan, Pennsylvania and others, if a certified copy of the certificate of amendment is not filed by a foreign corporation within a specified time after the filing of the original in the state of incorporation, the corporation becomes liable for heavy fines or forfeiture of its authority to do business in the state.

Under the New York statutes, if a qualified foreign corporation changes its name without having *previously* obtained from the Secretary of State of New York a certificate of availability of the proposed name, it loses its authority to do business in the State.

The requirements vary according to the State and according to the nature of the amendment. If the authorized capital stock is changed by an amendment, it is necessary in some states, in addition to the certified copy of the certificate of amendment, to file a supplementary certificate. If the capital represented by shares without par value is reduced without any change or amendment of the certificate of incorporation, it is necessary in Illinois to file a certified copy of the certificate of reduction and a certificate in prescribed form in order to obtain a corresponding reduction in the basis of the Illinois franchise tax.

In some states a certified copy of a certificate of amendment has to be filed in a county office as well as in the state official's office. In California, even though a corporation files a certified copy of a charter amendment in the county in which its principal office in the State is located, if it fails to file a certified copy in any other county in California in which it holds real property, it cannot maintain any action in relation to such property in that county.

Although the statutes of a number of states have no definite provisions regarding the filing of evidence of an amendment adopted by a foreign corporation subsequent to its qualification, the obligation to do so is implied from the provisions prescribing what have to be filed upon entering the state, and the state officials apply the statutes accordingly.

Many attorneys consider it important to comply with the implied, as well as the express, requirements of each state in connection with amendment of the charter of a foreign corporation because failure to do so leaves a corporation vulnerable with respect to its right to do business in a state or to maintain an action in the state courts.

Domestic Corporations

Michigan.

Right of action of creditors of a Michigan corporation which had transferred all of its assets to a new corporation organized under the laws of another jurisdiction, the latter corporation assuming the contracts and obligations of the former. In such case, so holds the Supreme Court of Michigan, affirming the judgment below for the creditor plaintiff, a right of action lies. (We do not go to the merits.) The defendants relied on the court's decision in *Tapert v. Schultz*, 232 N. W. 701. The court replies: "The distinction is apparent. The vendor in that case sold real estate under a land contract. His vendee assigned the contract, and the assignee agreed therein to assume the obligation of the vendee to make payment to the vendor. In this case the defendant took over all of the assets of the Missouri corporation, and, as a part of the consideration therefor, assumed its liabilities. The Michigan corporation was thereby left without assets on which the plaintiff might realize to collect its indebtedness and the defendant, by its undertaking to pay, became the creditor of the plaintiff." *Morlock v. Mt. Forest Fur Farms of America, Inc., et al.*, 257 N. W. 880. Arthur F. Neef, of Detroit, for appellants. Wm. J. Kearney, of Albion (Rosenburg & Painter, of Jackson, of counsel), for appellee.

On acquiring stock of corporation for purpose of bringing suit to interfere with or control the management. (To the merits, here, we do not go.) The Supreme Court of Michigan says: "Ordinarily, no one is concerned with the motives of one who becomes the purchaser of corporate stock. * * * Any one who keeps within the limits of lawful action is entitled to the protection of the law, whatever may have been his motive. * * * Presumptively, the rules of law will give adequate redress for any injury suffered, and, when one avers that under the circumstances of the particular case equity should hear his complaint, it becomes important to inquire how plaintiff came to be placed in the position where he seeks the interposition of a court of equity. One who buys a minority interest in the stock of a private corporation for the sole purpose of instituting suit to interfere with or to control the internal policy of the corporation is not a particular favorite in a court of equity which does not lend itself to the furtherance of unconscionable conduct. One who buys corporate stock in contemplation of instituting suit by reason of such stock ownership is usually left to his remedy at law and denied relief in equity." *Wagner Electric Corporation v. Hydraulic Brake Co., et al.*, 257 N. W. 884.

New Jersey.

Right of holders of certain subordinate notes to sue before default. Bill for appointment of receiver for a New Jersey corporation. The defendant alleges that it is not insolvent. The record indicates that

it is not, but does show that heavy losses have been sustained. Serious dissention among the stockholders is evidenced. Vice Chancellor Egan (Court of Chancery of New Jersey) says: "Despite the accorded 'breathing spell' (in a previous suit, i. e., *Kelly v. Kelly Springfield Tire Co.*, 152 A. 166) matters went from 'bad to worse,' and no appreciable change was effected, and no cessation of the losses resulted. How long should this condition be permitted to continue without check? When will it be overcome. * * * I shall accordingly advise a decree pursuant to the prayer of the bill." Suit brought by holders of 10 year, 6% notes, not in default; intervening stockholders. The note agreement provides: "No holder of any note shall have any right to institute any suit, action or proceeding, in equity or at law for the execution of any trust hereunder or for the appointment of a receiver or for any other remedy hereunder, or to enforce notes." The agreement also provides that before bringing suit, etc., the note holders shall have given to the trustee written notice of a completed default. Complainants admit they have given no such notice but assert that the provision does not apply to this suit. In this the court sustains complainants, saying: "It is my feeling that the complainants are absolutely within their rights in initiating these proceedings and seeking relief in the court, even though there be no default." *Garr et al. v. Kelly-Springfield Tire Co.*, 176 A. 85. Merritt Lane, of Newark, for complainants. Pitney, Hardin & Skinner, of Newark, for defendant. Lindabury, Depue & Faulks, of Newark for intervening stockholders. Alfred F. Ritter, of Brooklyn, N. Y., for preferred stockholders holding 3000 shares.

New York.

Legality of a "reorganization" under the laws of another state will not be determined by New York court. Action in a new court by stockholders of one of the corporations a party to a consolidation-reorganization effected under the laws of New Jersey, against the consolidated corporation, et al., seeking redress for alleged wrong suffered by them as a result of the consummated reorganization plan. Motion to dismiss the complaint was denied below. The New York Supreme Court, Appellate Division, First Department, reverses, granting the motion to dismiss. The court says that it is evident that the rights of the plaintiffs depend on the validity under the New Jersey law of the consolidation. "If the consolidation proceedings are valid and effective, then the plaintiffs are not entitled to succeed. If invalid and ineffective then we must assume that the plaintiffs are entitled to enforce their rights as sockholders of Kelly-Springfield Tire Company against the assets in the possession of the consolidated corporation. It will thus be seen that the decision of this action would require the courts of this state to investigate and determine the validity and effect of the consolidation proceedings between corporations organized in New Jersey and to ascertain and pronounce upon the rights of nonassenting shareholders of Kelly-Springfield

Tire Company and their corporation under the law of that state. We think that such a jurisdiction ought to be declined." *Bickart et al. v. Kelly-Springfield Tire Co., et al.*, 276 N. Y. Sup. 372. Gleason, McLanahan, Merritt & Ingraham, of New York City (Scott McLanahan, of New York City, of counsel), for appellants. Robt. P. Weil, of New York City, (Robert P. Weil, of New York City, of counsel; Laurence Arnold Tanzer, Eugene Mullaney, and Warren W. Foster, all of New York City, on the brief), for respondents.

Oklahoma.

Contract by corporation to repurchase at par stock sold at par will be enforced by the courts. Here the plaintiff-in-error inaugurated a stock selling plan using its employees as agents to sell to the local public. By the terms of the sales contracts made under such plan, a par market was to be maintained, i. e., it was agreed that the company would repurchase any stock so sold at par ($100). Plan worked well for several years; par market was maintained even when market value was $88. Then, defendants-in-error who had made purchases received notice that, partly because of the depression, it had become impractical to maintain the par market. Stock offered for repurchase; refused; this suit begun to recover purchase price with interest. Judgment for plaintiffs. The Supreme Court of Oklahoma affirms, saying, after considering and discussing the many defense contentions: "By the overwhelming weight of authority it is held that contracts of this nature are valid and will be enforced by the courts, where the seller refuses to carry out the agreement to repurchase." *Oklahoma Natural Gas Corporation v. Douglas and three other cases*, 39 P. (2d) 578. Allen, Underwood & Canterbury and Paul Pinson, all of Tulsa, for plaintiff in error. Bailey E. Bell, of Tulsa, and M. A. Dennis, of Okmulgee, for defendants in error. A. W. Widdows, of Tulsa, amicus curiae.

Oregon.

Examination of corporation's books by stockholders. Proceeding in mandamus to compel the defendant corporation to produce and allow an inspection by plaintiff stockholders of its books and records. The Supreme Court of Oregon affirms the judgment below for plaintiffs. A stockholder is an "interested person" within the meaning of the term as used in the right-to-inspect statute. Mandamus is the appropriate remedy. There was complete failure to substantiate the charge of "improper motive." The court concludes: "That the findings of the court are amply sustained by the evidence is apparent from a careful reading of the testimony. It appears therefrom that since 1927 at all times the defendant company has been under the sole control and management of Dr. A. L. Richardson; that during all said time there has never been a stockholders' meeting nor a directors' meeting. So far as the record shows, there are no board of directors and no regularly elected officers. The property of the

corporation is of large value and there has been no accounting made for any moneys received or for any disbursements made. Under these circumstances the plaintiffs were entitled to the relief granted." *Ralston v. Grande Ronde Hospital,* 39 P. (2d) 362. E. R. Ringo, of La Grande, for appellant. S. H. Burleigh, of La Grande, and A. A. Smith, of Baker (Burleigh & Burleigh and Heilner, Smith, Grant & Fuchs, of Baker, on the brief) for respondents.

On the right of a corporation to purchase its own stock. A contract was entered into between the named defendant-respondent and one of its stockholders, all stockholders assenting and charter, by amendment, authorizing purchase of its own stock, to be held as treasury stock for resale, etc., to purchase a large block of its stock from him on terms calling for part cash and 10 annual installments. At the time there was surplus in excess of the contract price. Stock held in escrow. Later all surplus gone and capital somewhat impaired. Going concern and not insolvent. Five annual installments not paid. Subsequent to contract and with full knowledge thereof as well as of the five unpaid installments plaintiff corporation became a creditor of the defendant corporation; debt and interest thereon not in default. It sought, here, to enjoin the corporation from making any further payments under the contract. Full discussion of American and English rules on purchase of its own stock by a corporation. Oregon has no statutory provision, directly covering. Bill dismissed below. The Supreme Court of Oregon affirms. The court says: "We find no authority in any of the cases cited or in any of the text-books which would authorize the issuance of an injunction under the facts proven in the instant case." "The larger question of whether an Oregon corporation has the right to purchase its own shares is likewise not now necessary for decision. That question involves a matter of serious import, and is one with which the public is vitally concerned. If the right is to be recognized, therefore, it should be sanctioned by the Legislature, where all proper safeguards for the protection of creditors and stockholders may be imposed, rather than by the courts. It not being necessary for decision at this time, it is left open for future decision unless previously settled by prior enactment." *Loveland & Co., Limited, v. Doernbecher Mfg. Co., et al.,* 39 P. (2d) 668. Roscoe C. Nelson, of Portland (Dey, Hampson & Nelson, of Portland, on the brief), for appellant. O. A. Neal, of Portland, for respondent Doernbecher Mfg. Co. Platt, Platt, Fales, Smith & Black, of Portland, for respondent United States Nat. Bk. M. M. Matthiessen, of Portland (Wood, Montague, Matthiessen & Rankin, of Portland, on the brief), for respondent B. P. John.

Texas.

Sufficiency of answers to interrogatories in writ of garnishment. Effort here is to collect a judgment obtained by defendant-in-error against one Felix Muleski. Judgment below for plaintiff by default.

Finding the answers sufficient, at least to the extent of preventing the taking of a judgment by default, the Court of Civil Appeals of Texas, San Antonio, reverses and remands. We run only to that portion of the answer relating to stock ownership which reads as follows: "Further answering, said garnishee says that neither at the time of the service of said writ of garnishment, nor since, nor now, is or was there any stock of the said Armour & Company, an Illinois corporation (Armour and Company of Delaware, a Delaware corporation), shown by the records of said corporation to be owned or held by said Felix Muleski and that said garnishee has no knowledge of any ownership or holding of stock or any interest whatsoever in said corporation by the said Felix Muleski." The appellate court says: "It is further contended that the answer does not positively state that Muleski does not own any stock in plaintiffs-in-error's company, but we do not agree with this contention. It occurs to us that this answer goes as far as an officer of a corporation can go in stating that a party does not own any stock in the corporation." *Armour & Co. et al. v. Gray et al.*, 77 S. W. (2d) 597. Brown & Bader, of Edinburg, for plaintiffs in error. Kelley, Looney & Norvell, of Edinburg, for defendants in error.

Washington.

Action to recover on a stock subscription. Action here is to recover on a note given in payment of a stock subscription. Judgment below for plaintiff is affirmed by the Supreme Court of Washington. Of the three affirmative defenses the third (of the other two no mention need be made) "alleged that certain other stockholders of the respondent corporation, then being the officers thereof, withdrew corporate funds for their personal use without the consent of the trustees or stockholders; that they had caused to be issued to themselves capital stock of the corporation without consideration, and that by the issue of this stock. they owned substantially all the corporate stock and control of the operation and management of its assets; that they were insolvent, and that the cash value of their interest in the corporation was not sufficient to repay to it the funds withdrawn, and that any funds paid by appellants to the corporation would be in danger of dissipation without an adequate remedy at law to recover the sums so dissipated; and that these stockholders, by reason of the fact that they owned substantially all the capital stock, would be the only persons to be benefited by recovery from appellants." The court's reply to this is: "If the affairs of a corporation are mismanaged by its directors or other officers, or by a majority of the stockholders of the corporation, stockholders not participating in the fraudulent or wrongful acts have a remedy in court, but such mismanagement does not discharge a stockholder from liability on his subscription, and is no defense in an action thereon." *Old Colony Securities Corporation v. Sahlin et al.*, 38 P. (2d) 1010. Clyde H. Belknap, of Spokane, for appellants. R. C. Hazen, of Seattle, for respondents.

West Virginia.

A corporation may not practice optometry. The holding here, by the West Virginia Supreme Court, is that optometry is a profession, that a corporation may not practice optometry, and, specifically, that a corporation may not practice optometry through a registered and licensed optometrist. An optical company and affiliated corporations, so says the court, practice optometry, in West Virginia and other states, through registered and licensed optometrist employees, in connection with the trade or occupation of optician. In the instant case an employee of the optical company, a registered and licensed optometrist, was placed in a Charleston, W. Va. department store, where he practiced his profession on behalf of the optical company. An injunction was sought inhibiting and restraining the optical company and the department store from continuing the practice. Granted below. The West Virginia Supreme Court affirms. *W. T. Eisensmith et al. v. Buhl Optical Company et al.*, decided December 22, 1934, Commerce Clearing House Court Decisions Reporting Service, Requisition No. 128385.

Foreign Corporations

Florida.

On service of summons on behalf of a foreign corporation. This is an action in tort for damages against an Alabama corporation in a Florida court (Escambia County) service of summons on behalf of the company having been made on one of its salesmen, resident in Florida. The summons was not brought to defendant's attention, and it did not appear. Judgment by default and after further proceedings final judgment rendered against the defendant. In addition to soliciting orders, which were sent to Alabama for approval and from which state all approved orders were shipped, the salesman did some collecting. The lower court held that this was sufficient to cause the salesman to be "a business agent" of the defendant as set forth in the statute and there being within the county no one of the several officers specified in the statute for acceptance of service, the service was good. The Supreme Court of Florida, Division B, affirms. The court adds: "The fact that corporate business is interstate in character does not immunize the corporation from service of process in state courts." *George A. Hormel & Co. et al. v. Ackman*, 158 So. 171. Watson & Pasco & Brown, of Pensacola, for plaintiffs-in-error. John M. Coe, of Pensacola, for defendant-in-error.

Michigan.

Service of notice on a defunct foreign corporation which had not been licensed to do business in Michigan. It is not essential that facts should be stated, here, except that title to certain Michigan realty stood in the name of a defunct New York corporation. The

EDWARD J. FLYNN
SECRETARY OF STATE

FRANK S. S

STATE OF NEW YORK
DEPARTMENT OF STATE
DIVISION OF CORPORATIONS
ALBANY

March 18, 1935.

The attention of counsel for New York cor-porations is respectfully invited to Chap. 908, Laws of 1934, which requires every business corporation formed prior to January first, 1935 (except those formed between Nov. 1, 1934 and Jan. 1, 1935) to fil in the Department of State, a certificate designatin the Secretary of State as the agent of the corpora-tion upon whom process may be served in any action or proceeding against it, and setting forth an address t which the Secretary of State shall mail a copy of su process.

A corporation which has omitted to file th prescribed certificate is nevertheless bound by servi upon the Secretary of State who becomes its agent by operation of law. The statute directs that in such case the Secretary of State shall mail a copy of the process addressed to one of the directors named in th certificate of incorporation. As the person so nam may no longer be connected with the corporation or m have changed his address, the defendant is liable to have judgment taken against it by default. Service on the corporation is complete upon delivery of the s mons to the Secretary of State, regardless of whether corporation does or does not actually receive the cop mailed to the director.

There are approximately two hundred thous active business corporations of which only about fort five thousand have filed designations. About one th and summonses have been served on the Secretary of St since the first of last November and many of them mail to directors named in the certificates of incorporati of companies which have not filed designations have b returned undelivered by the post-office.

Frank S Sh

The Corporation Trust Company is pleased to extend to the State Department of New York the assistance of The Corporation Journal in bringing to the attention of lawyers the condition pointed out in Mr. Sharp's letter on the opposite page.

Great hardship may be caused to those New York corporations that do not comply with the new law.

Further in connection with the same law, the attention of attorneys is directed to the new special service The Corporation Trust Company is rendering to lawyers through its Albany office in the personal service of process on the Secretary of State for those corporations which have filed their designations. A full description of this new service will be found on page 362 of this number of The Corporation Journal.

Michigan statutes provide that in case of a domestic corporation, whose corporate existence has expired, if the sheriff makes a return that, on careful inquiry, he has been unable to find any president, secretary, treasurer, or general agent of such company, service of the notice may be made on such corporation by publication. The Supreme Court of Michigan says: "The statute, it is true, does not specifically provide the method of service of the notice, in case of a dissolved foreign corporation never admitted to transact business in this state and, therefore, never having had a general agent here, but there is good sense in holding that substituted notice, good as to a defunct domestic corporation, fulfills all useful requirements as to a defunct foreign corporation." *Weber v. Enoch C. Roberts Iron Ore Co. et al.*, 258 N. W. 408. Appearances: Frank E. Hook, of Ironwood, Lou J. Le Veque, of Marquette; Miller, Eldredge & Eldredge, of Marquette.

On "doing business" and service of process on agent. Assuming that a foreign corporation is doing business in Michigan process may be served on its behalf on any agent "and any person representing such corporation in any capacity, shall be deemed an agent within the meaning of this section." The one on whom process was served in this case was a soliciting agent of a Pennsylvania corporation, not licensed to do business in Michigan (hereafter referred to as York). He maintained an office at his own expense, and placed the name of York on his office door and in the telephone directory. In the instant case (action for damages on account of failure of machinery purchased of York and shipped from Pennsylvania to operate satisfactorily), the agent superintended the original installation and assisted other employees of York in a long conducted but unsuccessful effort to remedy the defects. The Michigan Supreme Court, affirming the judgment below for plaintiffs, holds the service good, if York was "doing business" in Michigan and the court finds that it was. The court says: "It should be remembered, we are not defining the term 'doing business' for the purpose of determining whether defendant York is taxable or subject to the qualifying laws of this state, but only for the purpose of determining its amenability to service of process." The extent of the doing of business in Michigan is indicated by statements made above. Questions of contract (there was no written contract) and of warranty were answered adversely to York. "Even though York's part in the transaction be thinly disguised by the attempt to have the contract made in the name of a local distributor, the defendant York was amenable to service of process in this State and that under the facts presented it was doing business in this State." *Malooly et al. v. York Heating & Ventilating Co. et al.*, Commerce Clearing House Court Decisions Reporting Service, Requisition No. 130449.

Oklahoma.

On "doing business." A suit brought by an Alabama corporation, not licensed to do business in Oklahoma, against Oklahoma parties

for an alleged balance due on the sale of certain merchandise. Defense: doing business in Oklahoma without a license. The Oklahoma Supreme Court affirms the judgment below for plaintiff. In defense an exclusive agency contract is quoted as is part of a letter asking that the contract be canceled since "our representative in Oklahoma has balled things up considerably." It was contended that the foregoing is sufficient to bring the cause within certain named cases. The court says that the contention cannot be sustained. "In each of the above cases title to property shipped by the foreign corporation into the other state, wherever such foreign corporation was not licensed to do business, was retained in the company, and was to be sold by the agent for the company at prices fixed by the company. It was properly held in such cases that the foreign corporation was doing business in the state of Oklahoma in the two cases and the state of Kansas in the other. The mere fact that a foreign corporation may have an agent or representative in this state is not proof that such corporation is doing business in this state. The further fact that it ships goods or merchandise into this state under contracts solicited or obtained by such agents in this state is not proof that such business is intrastate and not interstate business." Burden was on defendant to prove its defense. *Dunn v. Birmingham Stove & Range Co.*, decided January 29, 1935. Commerce Clearing House Court Decisions Reporting Service, Requisition No. 131084.

Texas.

On "doing business." The Court of Civil Appeals of Texas (San Antonio), says: "A foreign corporation which does not maintain a place of business within this state, which only has canvassers, who submit orders for approval at the home office or a branch office, and an installer, who erects machinery sold, and which ships all goods sold from outside the state direct to the purchaser, is not engaged in business within this state within the meaning of the Texas statutes so as to require that it obtain a permit to do business in this state as a prerequisite to the right to maintain a suit in the courts of this state. Nor does the execution of an assumption agreement by a sub-vendee of an original purchaser change the character of the transaction." *North et al. v. Mergenthaler Linotype Co.*, 77 S. W. (2d) 580. E. B. Ward, of Corpus Christi for appellant. George Sergeant, of Dallas, and Boone, Henderson, Boone & Davis, of Corpus Christi, for appellee.

Taxation

California.

Change of basis for determining depletion allowance in the case of oil and gas wells; alleged retroactivity of the provision. By the original provisions of the California Bank and Corporation Franchise Tax Act (Stats. 1929, p. 19), imposing franchise taxes based on or measured by net income, owners of oil and gas wells acquired

prior to January 1, 1928, were authorized to compute depletion of such holdings on the basis of January 1, 1928, valuation. The tax for the current year accrues on January 1, and is measured by the income of the then past year. By amendment of February 27, 1931, the depletion, in the case of properties acquired prior to March 1, 1913, is to be based on value as of that date. The validity of this provision was strenuously contested. It is upheld by the Supreme Court of California. The tax for 1931 accrued on January 1; basis was 1930 net income; such net income resulted from the use of the then authorized January 1, 1928, valuation. The 1931 amendment of February necessitated computation of 1930 income (the measure of the tax for 1931) on the March 1, 1913, valuation basis. This, it was urged, would be to give to that amendment an unlawful retroactive effect. The court, upholding the full force and effect of the amendment, says that "the retroactivity is more apparent than real"; the tax is for 1931, for the full 1931 year; taxes for the current year may be changed at any time during the year; etc. The judgment below for plaintiffs is reversed by the Supreme Court. *Fullerton Oil Co. v. Johnson,* 39 P. (2d) 796. U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen. (Roger J. Traynor, of Berkeley, and Frank M. Keesling, of Sacramento, of counsel), for appellant. Claude I. Parker and George H. Koster, both of Los Angeles (Bayley Kohlmeier, of Los Angeles, of counsel), for respondent.

Florida.

Itinerant merchant's license fee. Chapter 14528, Laws of Florida, Acts of 1929, imposes an annual graduated license fee on itinerant merchants, based on the amount of stock employed in the conduct of the business operated. "Itinerant merchant," so reads the act, "shall be construed to mean any person who engages in this state in a seasonal business during certain seasons of the year only, of selling or offering for sale goods, wares or merchandise, but shall not apply to merchants having a permanent place of business in this State throughout the year who engage in business therein only for a portion of the year." Suit by many plaintiffs to enjoin the enforcement of the act against them, on various grounds—unconstitutional (unreasonable classification, lack of due process and equality before the law)—or if constitutional, because not applicable to them. From an adverse order plaintiffs appeal. The Supreme Court of Florida holds the act valid but not applicable to appellants ("with the possible exception" of three or four) and so affirms in part and reverses in part. The court says as to "itinerant merchants": "It appears that it has been attempted to construe the act to mean that if a merchant has a permanent place of business in the state where he conducts a mercantile business throughout the year he may then engage in the business of an itinerant merchant elsewhere within the purview of Chapter 14528, supra, without being required to pay the license therein provided; but this construction is not tenable. The language is plain that the term 'itinerant merchant' shall not apply

to merchants having a permanent place of business in this state throughout the year *who engage in business therein only for a portion of the year.*" (Italics are of the court.) The Chief Justice concurring says that the Legislature, apparently "has through inadvertence in the use of statutory language defeated the purpose it had in mind." *Greenleaf & Crosby Co., Inc. et al. v. Coleman, Sheriff, et al.*, 158 So. 421. J. Harvey Robillard, of Miami Beach, for appellants. Cary D. Landis, Atty. Gen., and H. E. Carter and J. V. Keen, Asst. Attys. Gen. for appellees. A. Frank Katzentine, W. Sanders Gramling, and Loftin, Stokes & Calkins, all of Miami, Sabel & Reinstein, of Jacksonville, and Lambdin & Ramseur, of St. Petersburg, as amici curiae.

Georgia.

City ordinance imposing license fees on filling stations based on storage capacity held valid. The city of Atlanta is given by its charter, the power to lay taxes on businesses, trades, and professions, carried on within its limits, and to classify them for the purposes of such taxation, subject to the restriction of the State Constitution that all taxation shall be uniform upon the same class of subjects. Pursuant to the power thus granted the city has by ordinance imposed certain progressive license fees on filling stations the amount of the levy being determined by the total storage capacity of the respective stations. Having been convicted of doing business without having paid the prescribed fees applicable to his several filling stations, the plaintiff in error appeals. The Court of Appeals of Georgia, Division No. 1, affirms. The principal contention of the defense was "unreasonable classification." On this point the court says, inter alia: "In the first instance it is for the Legislature to judge of the reasonableness of the classification; but finally the courts decide for themselves the reasonableness or unreasonableness of the classification. Now by what rule are the courts governed in deciding upon the reasonableness or unreasonableness of such classification? Classification must be based on some reasonable ground. It cannot be an arbitrary selection. This is about as accurately as the rule can be stated. The classification must square with the rule of reason. The classification must be based on some difference which bears a just and proper relation to the attempted classification." *Wright v. City of Atlanta*, 177 S. E. 753. Ralph R. Quillian, and Dillon, Calhoun & Dillon, all of Atlanta, for plaintiff-in-error. Jas. L. Mayson, Courtland S. Winn, J. C. Savage, all of Atlanta, for defendant-in-error.

Indiana.

Intangible Tax Law and Gross Income Tax Act held valid. On January 29, 1935, the Supreme Court of Indiana held valid the "Intangible Tax Law" (Chapters 81, 82 and 83, Indiana Laws of 1933) and the "Gross Income Tax Act of 1933" (Chapter 50, Indiana

Laws of 1933). The first was an action under the Declaratory Judgment Act; the second was a taxpayer's action to enjoin the paying out of public funds for the publication of Chapter 50. Respectively reported at 193 N. E. 840 and 193 N. E. 855.

Kentucky.

Interpretation of Kentucky's gross receipts tax law. The tax here in question is imposed by Chapter 25, Laws of West Virginia, Extra Session, 1934. Appeal from a judgment under a declaratory judgment action. The Court of Appeals of Kentucky says: "Summarizing our conclusions are: (a) That the tax involved here creates a burden upon the purchaser, or buyer, and is not one borne by the seller or merchant; (b) that as merchant or seller municipalities, as well as charitable and educational institutions, are required to charge it and collect it from all customers who are not exempt from paying it, and to account therefor; (c) that municipalities, as buyers of the taxed commodities, must pay the tax as required by the statute upon all purchases made by them, upon the sale of which the levy is made, except those made exclusively for their educational and charitable institutions; (d) that the merchant or seller is exonerated from paying the tax on sales made to charitable and educational institutions, and other classes of buyers who may be exempt as purchasers; and (e) that such exempt purchasers are the state and its administrative institutions, and also purely educational, eleemosynary, and charitable institutions, as well as purely federal activities." *City of Covington et al. v. State Tax Commission et al.*, 77 S. W. (2d) 386. S. L. Blakely, of Covington, for City of Covington. Mark Beauchamp and John L. Woodbury, both of Louisville, for City of Louisville. Trabue, Doolan, Helm & Helm, of Louisville, for Peaslee-Gaulbert Co. Grover G. Sales and Howard B. Lee, both of Louisville, for Family Service Organization. Burke & Lawton, of Louisville, for Nazareth Literary and Benevolent Institution and Roman Catholic Bishop of the Diocese of Louisville. B. P. Wootton, Atty. Gen., and S. H. Brown and H. H. Rice, Asst. Attys. Gen., for State Tax Commission.—The Kentucky gross sales tax (Act of March 17, 1930) was declared unconstitutional on March 11, 1935, by the U. S. Supreme Court (Nos. 454, 455, 456 and 457.—Oct. Term 1934).

Oregon.

Income derived from contract with Federal government is to be included in net income which is the basis for state excise tax. Plaintiff, here, is a Washington corporation licensed to do business in Oregon. It entered into a contract with the United States government to provide labor and material in the construction of a dam and works in Oregon in connection with an irrigation project. Oregon required the corporation to pay excise or privilege taxes based on the amount of net income received by it as a result of its operations under the contract. Having paid such taxes the company seeks

recovery on the grounds that the act, so far as it attempts to impose the tax as above stated, is unconstitutional for that it impairs the obligation of a contract and imposes an unwarranted tax on the functions of the Federal government. Judgment below for the state. The Supreme Court of Oregon affirms. The court is unable to "see how the tax complained of impaired said contract or hindered the Federal government in its governmental functions." "The courts are not unanimous in their opinion as to what constitutes an agency or instrumentality of the government. The weight of authority would indicate that a corporation contracting with the United States or the state as an independent contractor for gain cannot claim immunity from taxation by reason of its furnishing labor and services either to the United States or to the state, unless some statute specifically exempts such contractor from taxation in regard to the particular contract involved." *General Const. Co. v. Fisher et al.*, 39 P. (2d) 358. W. S. Greathouse, of Seattle, Wash. (Eggerman & Rosling, of Seattle, Wash., on the brief), for appellant. Willis S. Moore, Asst. Atty. Gen. (I. H. Van Winkle, Atty Gen., on the brief), for respondents.

South Carolina.

Stock dividend and property outside the state to be included in valuation of stock subject to capital stock tax. The South Carolina corporation here involved increased its capital stock; a portion of the increase was issued for cash; other portions were issued as stock dividends by transfer of surplus to capital. The corporation has two cotton mills, one in South Carolina, the other in Georgia. South Carolina imposes on a domestic corporation an annual license fee on each dollar paid to the capital stock of such corporation. The questions before the Supreme Court of South Carolina were (1) are the amounts of the stock dividends, and (2) is the value of the capital stock apportionable to the Georgia mill, to be included in the stock valuation subject to capital stock tax? Both questions answered in the affirmative. As to (1), the court, after presuming "that for each dollar issued by way of stock dividend, there was a cash equivalent to stand behind said issue," continues—"The corporation and its duly constituted authorities, having elected to transfer the surplus fund to capital stock which made such dividend stock not taxable as income under the federal or the state law, cannot now escape the state license tax by saying that this stock is still surplus." As to (2), the claim being that to include the Georgia mill valuation will be an illegal interference with interstate commerce, the court says that there is no such interference and as the corporation "operates both plants under a South Carolina charter, and this being the state of its incorporation, it is subject to the tax laws of this state," including one imposing a license tax on domestic corporations. *Pacolet Mfg. Co. v. Query et al.*, 177 S. E. 653. Perrin & Tinsley, of Spartanburg, for petitioner. John M. Daniel, Atty. Gen., and J. Fraser Lyon, of Columbia, for respondents.

Transfer Agents Liable For Transferring Stock After Stop Order.

A certificate of stock sent by messenger from one broker to another was not delivered. Both the owner broker and the indemnity company directed the New York transfer agent to stop transfer. Later a good faith purchaser of the stock presented the certificate for transfer which was effected. In a suit by the indemnity company (by its liquidator) against the New York transfer agent recovery was had for the value of the stock in the New York Supreme Court, New York County, March 14, 1935.

CORPORATE MEETINGS HELD

During the past few weeks, meetings of the corporations named below, among many others, have been held at some one of the offices of The Corporation Trust Company.

Ethyl Gasoline Corporation
United Carbon Company
Ward Baking Corporation
Twin City Rapid Transit Company
Marine Midland Corporation
H. M. Byllesby and Company
Continental Baking Corporation
Interlake Iron Corporation
United States Realty and Improvement Company
The American Light & Traction Corporation

Some Important Matters for April and May

This calendar does not purport to cover general taxes or reports to other than state officials, or those who have been officially advised are not required to be filed. *The State Report and Tax Service* maintained by *The Corporation Trust Company System sends* timely notice to attorneys for subscribing corporations of report and tax matters requiring attention from time to time, furnishing information regarding forms, practices and rulings.

ALABAMA—Annual Franchise Tax due April 1, but may be paid without penalty until April 30.—Domestic and Foreign Corporations.

ARKANSAS—Return of Information at the source due on or before May 15.—Domestic and Foreign Corporations.

CALIFORNIA—Quarterly Retail Sales Tax Return and Payment due on or before April 15.—Domestic and Foreign Corporations.

COLORADO—Annual License Tax due on or before May 1.—Domestic and Foreign Corporations.

DELAWARE—Annual Franchise Tax due after April 1 and before July 1. —Domestic Corporations.

DOMINION OF CANADA—Annual Summary due between April 1 and June 1.—Dominion Companies.

Income Tax Return due on or before April 30.—Domestic and Foreign Corporations.

INDIANA—Quarterly Gross Income Tax Return and Payment due on or before April 15.—Domestic and Foreign Corporations.

IOWA—Quarterly Retail Sales Tax Return and Payment due on or before April 15.—Domestic and Foreign Corporations.

KANSAS—Income Tax Return due on or before April 15.—Domestic and Foreign Corporations.

LOUISIANA—Income Tax Return and Return of Information at the source due on or before May 15.—Domestic and Foreign Corporations.

MAINE—Annual Franchise Tax Return due on or before June 1.—Domestic Corporations.

MASSACHUSETTS—Excise Tax Return due on or before April 10.—Domestic and Foreign Corporations.

MISSOURI—Annual Franchise Tax due on or before May 15 and delinquent after June 1.—Domestic and Foreign Corporations.

Income Tax due on or before June 1.—Domestic and Foreign Corporations.

MONTANA—Annual Statement due within two months from April 1.—Foreign Corporations.

NEW MEXICO—Income Tax Return due on or before April 15.—Domestic and Foreign Corporations.

Franchise Tax due on or before May 1.—Domestic and Foreign Corporations.

NEW YORK—Return of Information at the source due on or before April 15.—Domestic and Foreign Corporations.

RHODE ISLAND—Semi-Annual Report to Chief Factory Inspector due in April and October.—Domestic and Foreign Corporations employing five or more persons in Rhode Island.

SOUTH DAKOTA—Quarterly Gross Income Tax Return and Payment due on or before April 30.—Domestic and Foreign Corporations.

TENNESSEE—Annual Excise Tax Report due on or before May 1.—Domestic and Foreign Corporations.

TEXAS—Annual Franchise Tax due on or before May 1.—Domestic and Foreign Corporations.

VERMONT—Income Tax Return due on or before April 15.—Domestic and Foreign Corporations.

VIRGINIA—Income Tax Return and Return of Information at the source due on or before April 15.—Domestic and Foreign Corporations.

WEST VIRGINIA—Annual License Tax Report due in April.—Foreign Corporations.

Quarterly Gross Income Tax Return and Payment due on or before April 30.—Domestic and Foreign Corporations.

The Corporation Trust Company's Supplementary Literature

In connection with the various departments of its business The Corporation Trust Company publishes the following supplementary pamphlets and forms, any of which it is always glad to send without charge to readers of The Journal:

New Deal Laws of Importance to Corporations—Contains complete text of Securities Act of 1933 as amended by Title II of the Securities Exchange Act of 1934, all matters in the original act omitted in the 1934 amendments being set in brackets, and all new matters added by the 1934 amendments being set in italics; complete text of the Securities Exchange Act of 1934; and complete text of the amendment approved June 7, 1934 to the Bankruptcy Act providing for corporate reorganizations.

The New Bankruptcy Law—Contains, first, the eleven-word amendment approved June 18, 1934 to the original amendment to the Bankruptcy Act approved June 7, 1934 (and published in our pamphlet New Deal Laws described above); second, two examples of voluntary petitions for reorganization under the new provisions; and third, two examples of petitions under the new provisions for appointment of trustees (reorganization sought).

The High Cost of Whistles for Corporations—Benjamin Franklin's classic, "The Whistle," here is shown, by the decisions in actual court cases, to have a very pointed application to some of the policies of some business corporations of our own day. A sixteen-page pamphlet for both laymen and lawyers.

Special Report—The Case Against Corporate Representation by Business Employes. Specific experiences of different corporations with the handling by untrained corporate representatives of such matters as service of process, notices of taxes due, filing of corporation reports, etc.

What Constitutes Doing Business. (Revised to April 15, 1934.) A 198-page book containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business." The digests are arranged by state, but a Table of Cases and a Topical Index make them accessible also by either case name or topic. There is also a section containing citations to cases on the question of doing business such as to make the company subject to service of process in the state.

Amateur Corporate Representation. A booklet dealing with some of the weaknesses of placing a company's statutory representation in the hands of business employes or others not trained in the matters involved.

Delaware Corporations. Presents in convenient form a digest of the Delaware corporation law, its advantages, for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation completely revised to reflect the changes made by the amendments of 1933.

When Corporations Cross the Line. A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

Questionnaire on Business Outside State of Organization. This is a form for attorney's use in determining when a corporation should be qualified. The questions are those which will usually bring out the points necessary to be considered.